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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 980

JAMES F. McMANUS,

—v.—

Plaintiff-Appellant,

LAKE CENTRAL AIRLINES,

Defendant-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Plaintiff-Appellant,

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Defendant-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, James F. McManus, prays that a writ of certiorari issue to review a Decision, Judgment and Decree of the United States Court of Appeals for the Second Circuit, which affirmed proceedings of the United States District Court for the Eastern District of New York.

Opinion Below

The decision of the Court of Appeals was decided January 10, 1964 (Appendix A, p. 25).

Jurisdiction

The Judgment and Decree of the Court of Appeals was entered on January 10, 1964 (Appendix B, p. 27). The jurisdiction of this court is invoked under 28 U. S. C. 1254(1).

Questions Presented

(a) Whether conference resolutions interposed on behalf of defendant-appellee are within the scope of Section 412 of the Federal Aviation Act.

(b) Whether or not Sections 412 and 414 of the act are constitutional or fatally defective.

(c) Whether a determination with respect to anti-trust immunization pursuant to Section 414 was a matter of fact to be resolved by the jury after trial.

(d) Whether the said District Court could have and should have granted petitioner's motion for a summary judgment in view of Civil Aeronautics Board Decision and Order E-14012 adopted June 10, 1959 (29 CAB 258).

(e) Whether Congress may grant any immunization from suits at common law brought by an individual.

Constitutional Provisions Involved

The Fifth Amendment of the Constitution:

> "No person * * * shall be * * * deprived of life, liberty or property without due process of law; * * *."

The Seventh Amendment of the Constitution:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Statutes Involved

It is noted that the Federal Aviation Act of 1958 (72 Stat. 737, 49 U. S. C. A. Section 1301 *et al.*) superseded the Civil Aeronautics Act of 1938 as amended (52 Stat. 977, 49 U. S. C. A. Section 401 *et al.*).

Pertinent provisions thereof are set forth:

Section 101 (32) of the Federal Aviation Act formerly Section 1 (32) of the Civil Aeronautics Act:

> "'Ticket agent' means any person, not an air carrier or a foreign air carrier and not a bona fide employee of an air carrier or a foreign air carrier, who as principal or agent, sells or offers for sale any air transportation, or negotiates for, or holds himself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts or arranges, for, such transportation" 72 Stat. 740, 49 U. S. C. A. 1301, formerly 52 Stat. 977 as amended by 62 Stat. 493, 65 Stat. 68, 66 Stat. 624, 49 U. S. C. A. 401).

Section 411 of the Federal Aviation Act and of the Civil Aeronautics Act:

> "The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair

methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition" (72 Stat. 769, 49 U. S. C. A. 1381 formerly 52 Stat. 1003 as amended by 66 Stat. 628, 49 U. S. C. A. 491).

Section 412 of the Federal Aviation Act and of the Civil Aeronautics Act:

"(a) Every air carrier shall file with the Board a true copy, or if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment; or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service; for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act: except that the Board may not approve any contract or agreement between an air carrier not di-

rectly engaged in the operation of air craft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it". (72 Stat. 770, 49 U. S. C. A. 1382 formerly 52 Stat. 1004 as amended by 56 Stat. 301, 49 U. S. C. A. 492).

Section 414 of the Federal Aviation Act and of the Civil Aeronautics Act:

"Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby relieved from the operations of the antitrust laws, as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order" (72 Stat. 770, 49 U. S. C. A. 1384 formerly 52 Stat. 1004, 49 U. S. C. A. 494). It is noted that 49 U. S. C. A. 1384 refers to statutory sections.

Statement of the Case

Petitioner, more than ten (10) years ago, in March of 1954, established two travel agencies in Nassau County in communities where there were no facilities for the purchase of transportation tickets. He promptly experienced difficulties with respect to business dealings with carriers; made informal complaints to the Civil Aeronautics Board relative to air carriers; received no satisfaction from the Board; dismantled one travel agency; gave public testimony in March of 1956 in an investigation of the airlines

conducted by the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives.

At page 1320 Part 1 Volume 2 Hearings Before the Antitrust Subcommittee (Subcommittee No. 5) of the Committee on the Judiciary, House of Representatives, Eighty-Fourth Congress, Second Session—Monopoly Problems in Regulated Industries, your petitioner is quoted as having complained on March 28, 1956 inter alia:

> "* * * I do not think that it is practical to subject anybody, especially an individual to start those procedures. They are lengthy, and actually they have got it in such a nice pat situation, that you cannot start it in a court, because of Apgar Travel—IATA, 107 F. Supp. 706."

The Board at the behest of the said Antitrust Subcommittee did, on October 31, 1956, make its order No. E-10719 finding that it was necessary in the public interest to determine if agency resolutions enumerated should be approved or disapproved, and dealt with resolutions of air carriers with respect to domestic air transportation and was termed the ATC Agency Resolution Investigation.

It is noted that the Board instituted its proceedings in October 1956, *only* after an appropriate letter from the chairman of the said subcommittee to the effect:

> "I believe that it is imperative that the Civil Aeronautics Board resolve this matter without delay."

Petitioner was granted leave to intervene in the ATC Agency Resolution Investigation after his petition therefor had included:

> "That James F. McManus has a right to conduct a business in the sale of air transportation but has been illegally and unconstitutionally restricted in the

sale thereof all through a total commercial boycott that has been effective as to him."

Petitioner testified and was cross-examined in said proceeding in April 1957. After some three years an application for the selection and appointment of his one remaining Levittown Travel Agency was *sponsored* by American Airlines Inc. and *co-sponsored* by Northwest Airlines Inc. under the procedures then in use. The record of the Board's proceedings was closed in May of 1957; the aforesaid *sponsored* application was "disapproved" by the ATC Agency Committee at their closed annual meeting in September 1957; the record of the Board's proceeding was reopened, your petitioner gave further testimony and was again cross-examined in February 1958.

A stipulation of fact was made a part of CAB's record in the Board's proceeding in February of 1958.

An Initial Decision of the Hearing Examiner was served on November 3, 1958.

It is noted that the Examiner's Initial Decision observed at page 80 thereof:

> "That the Board has jurisdiction to regulate the selection and retention of ticket agents there can be no dispute."

and further at page 87 thereof:

> "A full fledged or general travel agent must have access to the sale of air transportation on a commission basis if he is to economically survive and before he can sell air transportation on a commission basis he must have ATC approval."

Exceptions were filed; oral argument had in December, 1958.

The transcript of oral argument of December 17, 1958 in the CAB's ATC Agency Resolution Investigation set forth the following from an exchange between CAB member Minetti and John J. Stowell, Counsel for CAB's Bureau of Operations beginning at page 33 thereof:

"Mr. Minetti: Under the Isbrandtsen decision—you are acquainted with that—211 Fed. 2d.

Mr. Stowell: Yes.

Mr. Minetti: Does the CAB have the power to approve in advance by approving the basic resolution any and all actions which may be taken by the agency committee? The ATC Agency Committee?

Mr. Stowell: I would say that under that decision as I recall it held that the Maritime Board could not approve in advance a major change in the agreement. It involved the filing of a discriminatory rate, which was not encompassed within the basic machinery.

Normally when the Board approves agreements, as it has in the case of the ATC agency resolution, it specifically does not approve actions taken thereunder. It is the position of the Bureau that—

Mr. Minetti: But it approves the basic machinery.

Mr. Stowell: Approves the basic machinery.

Mr. Minetti: By approving that it doesn't approve any action that may be taken subsequently?

Mr. Stowell: That is true. The Board normally makes that clear it does not. But more specifically in answer to your question, I believe under that decision the Board probably could not approve all the actions taken by the agency committee in advance, and the reason I say that is that approval of an agreement grants immunity from the anti-trust laws. Immunity is normally construed very strictly, and the courts have held that you look at the grant of the immunity

in light of the particular facts presented to the agency, the administrative agency at the time. Obviously the Board could not know all the facts and circumstances when it was approaching the basic machinery which would permit it to approve in advance all the actions taken by the committee.

So I believe that the implications of that decision, as well as the cases restricting the granting of anti-trust immunity by an agency would preclude blanket Board approval of actions taken by the agency committee, even though they were within the basic machinery.

There is a recent case which also would support that. ACTA, Air Coach Transport Investigation v. Atchison, Topeka and Santa Fe Railroad, where the Court of Appeals had held that the immunity granted by the agency from the anti-trust laws relates only to those matters set forth in the agreement, and based on the facts presented to the agency at the time it does not relate to matters which are done pursuant thereto in a conspiracy to restrain trade, even though the language of the basic machinery might seem to encompass the action taken, if the action taken is in fact an action taken to restrain trade.

So in other words, clearly then the Board could not approve in advance an action of any agency committee which had the effect of restraining trade even if the Board approved the basic machinery thereby. So my answer is that the Board could not grant immunity from the anti-trust laws to actions taken by the agency committee under a basic approval of the machinery."

In July of 1958 your petitioner caused Summons and Complaints to be served. Shortly thereafter, Walter D.

Bruchhausen, *D.J.*, dismissed the action as against some five (5) air carrier defendants by an order pursuant to a decision reported as *McManus* v. *Capital Airlines, Inc.*, 106 F.Supp. 301 leaving approximately thirteen defendants including the defendant-appellee Lake Central Airlines, hereinafter Lake Central.

Lake Central interposed an answer setting forth three affirmative defenses which are here set forth:

> *"For A First Separate and Complete Affirmative Defense to the Cause of Action Alleged in the Complaint:*
>
> 26. At all the times mentioned in the complaint, Defendant Lake Central Airlines, Inc. was and still is a common carrier by air and engaged in the business of operating a regularly scheduled air transportation system for the carrying of passengers, cargo and mail in interstate commerce between various points in the United States, in the States of Illinois, Indiana, Michigan, Ohio, Pennsylvania, and the City of Buffalo in the State of New York, and duly authorized to engage in such operations by certificates of public convenience and necessity issued to it by the Civil Aeronautics Board (CAB).
>
> 27. Upon information and belief, the other Defendants were at all times mentioned in the complaint, and still are, common carriers by air and engaged in the business of operating a regularly scheduled air transportation system for the carrying of passengers, cargo and mail in interstate commerce between various points in the United States and, as to some of said Defendants, also engaged in foreign commerce between points in the United States and points without the United States and duly authorized to engage in such operations by certificates of public convenience and

necessity or foreign air carrier permits issued to them respectively by the CAB.

28. That, at all the times mentioned in the complaint, each of the Defendants was a member of a voluntary unincorporated trade association of so-called scheduled airlines in the United States engaged in interstate commerce known as the Air Transport Association of America (ATA). That the said ATA provides a method or means whereby the air carriers of the United States which are members thereof may conveniently consider and cooperate in the solution of their mutual problems.

29. At all times mentioned in the complaint, and for a number of years prior thereto, each of the Defendants, together with other air carriers who were members of the ATA, were parties to an agreement with one another, the basic terms of which are set forth in the Air Traffic Conference Agency Resolution (ATC Agency Resolution). Said ATC Agency Resolution as amended from time to time, has been in effect since 1945 and provides comprehensive rules regulating the relationships between the air carrier members of the Air Traffic Conference of America (a division of the ATA) and travel agents and also the relationships among the air carrier members of the Air Traffic Conference of America themselves with respect to travel agents.

30. The effective provisions of the ATA Charter and the said ATC Agency Resolution were duly filed with and approved by the Civil Aeronautics Board under Section 412 of the Civil Aeronautics Act of 1938, as amended (49 U. S. C. 492), and such approvals by the Civil Aeronautics Board were in effect at all times mentioned in the complaint.

31. Upon information and belief, some time prior to the month of September, 1957, a formal application was made on behalf of Plaintiff to the Air Traffic Conference of America, and pursuant to the terms and conditions of the ATC Agency Resolution, for approval and inclusion of the Plaintiff on the agency list of the Air Traffic Conference of America under the name of Levittown Travel Agency, 3000 Hempstead Turnpike, Levittown, New York, so as to make said agency eligible for appointment by such of the members of the Air Traffic Conference of America as might choose to appoint it pursuant to the ATC Agency Resolution. The application so made on behalf of the Plaintiff was thereafter duly considered by the Agency Committee of the Air Traffic Conference of America and said application was disapproved on or about September 10, 1957, by said Agency Committee in accordance with the provisions of the ATC Agency Resolution.

32. By virtue of the provisions of Section 414 of the Civil Aeronautics Act of 1938, as amended (49 U. S. C. 494), and of the terms of the ATA Charter and of the ATC Agency Resolution, which were approved pursuant to Section 412 of the said Act, the Defendant, Lake Central Airlines, Inc., and each of the other Defendants were and are relieved from the operations and effects of the so-called Anti-Trust, Conspiracy and Monopolies Laws of the United States and from all other restraints or prohibitions made by or imposed under authority of law, in performing, carrying out and acting pursuant to said resolutions. By reason thereof, immunity extends to Defendant, Lake Central Airlines, Inc., and to all other Defendants herein with respect to all of the matters complained of by the Plaintiff in his complaint, herein.

For A Second Separate and Complete Affirmative Defense to the Cause of Action Alleged in the Complaint:

33. Defendant repeats and realleges each and every allegation contained in paragraphs 29 to 35, inclusive, herein, with the same force and effect as if herein separately and fully set forth.

34. Upon information and belief, by reason of the Civil Aeronautics Act of 1938, as amended (49 U. S. C. 401 et seq.), the Civil Aeronautics Board of the United States is vested with primary exclusive jurisdiction to hear, consider and determine all of the matters complained of in the complaint herein.

35. That by reason of the foregoing, this Court is without jurisdiction to hear and determine the matters complained of in the complaint herein.

For A Third Separate and Complete Affirmative Defense to the Cause of Action Alleged in the Complaint:

36. Defendant repeats and realleges each and every allegation contained in paragraphs 29 through 38, inclusive, herein, with the same force and effect as if herein separately and fully set forth.

37. Upon information and belief, prior to the institution of this action, the Plaintiff, in accordance with and pursuant to the rules and regulations of the Civil Aeronautics Board of the United States filed complaints with said Civil Aeronautics Board and submitted evidence in connection therewith, which said complaints allege in substance all of the fact and charges set forth in the complaint herein and in which said complaints the Plaintiff requested the Civil Aeronautics Board to withdraw its approval from the ATC

Agency Resolution pursuant to which the ATC Agency Committee acted in disapproving Plaintiff for inclusion on the agency list of the ATC as alleged in the complaint herein and also requested the Civil Aeronautics Board to disapprove the action of the ATC Agency Committee by which action said Committee disapproved of Plaintiff for inclusion on the agency list of the ATC so as to be eligible for appointment by members of the Air Traffic Conference of America under the ATC Agency Resolution.

38. Upon information and belief, the complaints filed by the Plaintiff with the Civil Aeronautics Board and the issues and matters raised by said complaints, as alleged in paragraph 37 above, are still pending and undetermined by the Civil Aeronautics Board.

39. By reason of the foregoing, this Court is without jurisdiction to hear and determine the matters complained of in the complaint herein.

WHEREFORE, Defendant LAKE CENTRAL AIRLINES, Inc., demands judgment against the Plaintiff dismissing the complaint herein, together with costs and disbursements of this action.

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Order = CAB E 14012 (29 CAB 258) was issued on June 10, 1959 and expressly made a part thereof the aforesaid Examiners' Initial Decision and its 19 page decision which had expressly recognized at page 12 thereof:

"It must always be realized that this entire system of joint carrier screening of travel agencies is a substantial departure from the normal free competitive practices of our economy, and it would be clearly in violation of the Federal Antitrust Laws were it not for the immunity extended by Section 414 of the Act. *This is not a situation, therefore, where we can grant to the carriers on the basis of management expertise or discretion freedom to make decisions without detailed Board supervision and control. Through the ATC system the carriers hold life-and-death power over the travel agencies, and it is unthinkable that the carriers should exercise these powers without giving full notice of their reasons and providing ample opportunity for appeal. Certainly the carriers who here request the right to pass on agency applications and suspensions with no explanation of their actions and no real appeal would be the first to plead lack of due process if their own affairs were so regulated by the Civil Aeronautics Board.*" (Emphasis mine.),

On February 15, 1960 your petitioner's motion as a plaintiff for a summary judgment which did not rely on any affidavit, but only upon the complaint, answers and aforesaid CAB Order No. E 14012 (29 CAB 258) was denied in the District Court by an order based upon a decision reported as *McManus* v. *Capital Airlines, Inc.*, 25 FRD 34.

Shortly after such decision all remaining defendants with the exception of defendant appellant Lake Central began to enter into settlements. The defendant Trans World Airlines, Inc. paid $3,500.00 in December of 1962 long after the CCA-2 decision of 1961, *McManus* v. *Civil Aeronautics Board*, 286 F. 2d 414.

In a pretrial order in April of 1963, the District Court on its own motion included the following decision and order therein:

"the defendant's separate affirmative defense, primary exclusive jurisdiction is stricken on the ground questions involved do not bring to play the doctrine of primary jurisdiction and really involve only questions of law rather than administrative discretion or enforcement of law. See Federal Maritime Board v. Isbrandtsen Co., 1958, 356 U. S. 481 and Great Northern Ry. Co. v. Merchants Elevator Co., 1922, 259 U. S. 285."

After a week's trial in June of 1963, where your petitioner was well represented by eminent trial counsel, Judge Walter Bruchhausen read his decision which was plaintiff-appellant's "Appendix A" of the record of the Court of Appeals filed herewith, *dismissed the jury which plaintiff had demanded* and which had heard plaintiff and witnesses on behalf of plaintiff and the defendant, made an Order which was plaintiff appellant's "Appendix B" in his Brief in the Court of Appeals and then went further in taxing costs to ignore a citation of this Court's over-simplified decision in *Deal* v. *U. S.*, 274 U. S. 277, to allow costs and disbursements for witnesses on behalf of the defendant Lake Central for round trip travel outside of the District from such places as Indianapolis, Indiana and Washington, D. C. *finding their testimony had been necessary* and allowed Lake Central a claimed share of an examination before trial of your petitioner in which he had been indulged for weeks by attorneys on behalf of Lake Central and other defendants.

Appendix A hereof affirmed the judgment of the said trial Court ending with a Per Curiam Decision which concluded:

"The appellant is here seeking precisely that relief to which our earlier opinion told him he was not entitled. The judgment is affirmed."

The basis for jurisdiction in the Court of first instance was your petitioner relied not only upon common law, New York State Anti-trust law but sought the three-fold damage measures afforded by the Sherman Act.

Reason for Granting the Writ

The Court of Appeals has decided federal questions in a way in conflict with applicable decisions of this Court; and in affirming the proceedings of the U. S. District Court so far sanctioned a departure from accepted and usual course of judicial proceedings all in violation of your petitioner's fundamental rights as guaranteed by the Fifth Amendment and rights guaranteed by the Seventh Amendment.

Indeed if the Courts below acted within the scope of any statute that defendant appellee would assert it is respectfully submitted that this Court must now void such statute.

Argument

Your petitioner respectfully submits that the Court of Appeals decided this matter in a manner which is in conflict with applicable decision of this Court—including applicable principles from such cited cases as *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439; *Silver* v. *Securities and Exchange Commission*, 373 U. S. 96, and *United States* v. *Borden*, 308 U. S. 188 and *Wilkner* v. *Committee on Character and Fitness*, 373 U. S. 96. It must be remembered that CCA-2 in *McManus* v. *CAB*, 286 F. 2d 444, affirmed Decision and Order No. E 14012 (29 C. A. B. 258) which ordered the carriers to amend their Agency Resolutions to expressly provide for recordation and notification of the reasons for

rejection of an application and providing for a reconsideration and appeal procedure. CCA-2 affirmed *the whole order and decision*—not just sentences that it wrested from context. CCA-2 in affirming 29 C. A. B. 258 affirmed *all* the words of the Board—not merely the first sentence from a paragraph which concluded:

> "Certainly the carriers *who here request the right to pass on agency applications and suspensions with no explanation of their actions* would be the first to plead lack of due process if their own affairs were so regulated by the Civil Aeronautics Board." (Emphasis mine.)

Your petitioner respectfully submits that the practices of the Agency Committee which were brought to light by the CAB's ATC Agency Resolution Agreement were arrangements which were never filed with, much less approved by the Civil Aeronautics Board. How could anyone ever contend in good faith that an Agency such as CAB ever did or ever could approve any agreement which precisely called for a deprivation of due process, which precisely called for an arrangement where the reasons for rejecting an application were not recorded, and the applicant not notified thereof. Defendant-appellee cannot show such language in any agreement it would contend was or could be approved by any CAB order from 1941 to date!

CCA-2 ends its decision of January 10, 1964 with a curt:

> "The appellant is here seeking precisely that relief to which our earlier opinion told him he was not entitled. The Judgment is affirmed."

after it had affirmed, in 1961, 29 C. A. B. 258 which included:

"Should the gravamen of McManus' judicial complaint be limited to those issues concerning his treatment by the Agency Committee on which the Examiner made *findings*, our *adoption* of the Initial Decision in this regard may well satisfy any requirements imposed by the doctrine of primary jurisdiction." (Emphasis mine).

and CCA-2 affirmed 29 C. A. B. 358 where it said:

"Our prior orders approving the original Agency Resolution and the subsequent amendments to that agreement *only* to the extent *necessary* to enable the parties to the agreement to do anything authorized, approved or required by such orders." (Emphasis mine.)

The District Court should have granted plaintiff's motion for a summary judgment—how could any defendant ever have sustained the burden of an affirmative defense in the face of the Board's adoption of the Examiners' Initial Decision made after hearings and stipulation that at least one standard of the Agency Resolution had been subverted against your petitioner?

Assuming, but not conceding, that the Court was correct in denying the plaintiff's motion for a summary judgment—this Court must realize that due to the fact that the CAB's lengthy investigation revealed that there were unapproved arrangements or agreements not to record or notify rejected applicants of the specific grounds of rejection, that a defendant never could and never did sustain an affirmative defense to prove that actions taken were within the protection of language of the Section 414 of the Act especially in view of the words therein "necessary" and "authorized, approved or required by such orders."

Page 3 of your Petitioner's Brief in the Circuit Court of Appeals called attention to pages "2" and "3" of the Examiner's Initial Decision which CAB decision and order 29 CAB 258 made a part thereof.

This Court, upon proper review of this matter, will see that in voting upon an agent's qualifications, the Agency Committee was required to take into consideration some six or seven standards, and that by American's and Northwest sponsoring your petitioner's application they had vouched that he had met with the said standards.

Page 11 (a) of your petitioner's appendix before the Court of Appeals below set forth the following from a pre-trial stipulation:

> "12. That on or about the 16th day of September 1957 Richard Warburton, Long Island Sales Manager for American Airlines, Inc., stated to plaintiff: 'The Committee didn't approve it on the basis that not enough airlines were interested.
>
> We sponsored you.
>
> Sure that American Airlines and Northwest fought for you but the others weren't interested * * *'"

The Initial Decision of the Examiner at page 3 thereof said:

> "An applicant is found qualified and eligible for inclusion on the approved Agency List if two-thirds of the voting representatives present at the meeting so vote. In voting upon an applicant's qualifications, the Agency Committee is REQUIRED* to take into consideration the following factors:
>
> 1. A satisfactory credit standing;
> 2. A reputation for ethical practices in the sale of passenger transportation;

* Emphasis mine

3. Suitable premises;

4. Willingness and ability of the agent to sell air transportation particularly vacation, pleasure and tour travel;

5. The number of authorized Agency locations in the area involved;

6. The need of members for Agency representation in the area involved; and

7. (In the case of agents already on the list) the experience of the air carriers with such agents in performing their Sales Agency Agreement with the carriers."

Testimony in the trial Court admitted that the defendant Lake Central's Vice President of Traffic, one Donald S. Getchell, had participated in the September 1957 meeting at which your petitioner's application was "disapproved."

I quote from page 407 of the transcript of the Eastern District Court from Mr. Getchell's cross-examination:

"Q. Yes, sir. May I ask you this: At the meeting at which Mr. Irvine was appointed, if you walked out would it be possible that this would vary the number of votes required by a subsequent applicant to get on the approved list? A. I don't recall the—well, the indirect answer, it is possible. I don't recall the exact—

Q. In other words, if enough carriers that didn't want to see a man go on the approved list walked out, would it be possible that a man could miss approval? A. Well, I'd have to take a look at the Agency Committee rules then existing to see what was—what constituted a quorum and a majority.

Q. You don't have any recollection of that now? A. I don't recollect that now."

Lacking necessary votes from such carriers as Lake Central and other defendant members of the combination such as Western Airlines, Inc., Bonanza Air Lines, Inc., Continental Air Lines, Inc., Piedmont Aviation Inc. and Trans Texas Airways, Inc. on the grounds of "non-interest" certainly should not suffice.

Indeed, the Circuit Court of Appeals and the trial Court in their actions ignored the principles of law which I had set forth pursuant to the pre-trial order—by adopting as my own language and citations from page 16 of a Brief of Counsel to CAB's Bureau of Operations dated August 12, 1957 in CAB's ATC Agency Resolution Investigation:

> "Moreover, since under the resolution the members have associated themselves in the prosecution of a common plan in the selection and retention of agents through the Committee, they are legally chargeable with action taken by each other pursuant to the plan. The Committee system constitutes such concerted action as creates an agency relationship among its members, and the acts and declarations of one in furtherance of the common object are the acts of all. The fact that the common plan or enterprise is lawful (rather than unlawful) does not affect this principle. *Hitchman* v. *Mitchell*, 245 US 229; 249-250 (1917); *Overfield* v. *Pennroad Corporation*, 42 F. Supp. 486, 628-629 (E.D. Pa. 1941); Supp. Opinion, 48 F. Supp. 1008 (1943), aff'd, 146 F(2) 889, (3d. Cir. 1944). The common design or purpose of the Committee system in the selection and retention of agents appears through the individual actions of the members, since all the parties steadily pursue the same object, whether acting separately or together, or apart from or unknown to each other, by common or different means, but ever leading to the same result. *FTC* v. *Cement Institute*, 333 US

683, 717-719 (1948); *American Tobacco Co.* v. *U.S.*, 147 F. (2d) 93, 119 (6th Cir. 1945); *U.S.* v. *Schneiderman*, 106 F. Supp. 892, 900 (S.D. Calif., C.D. 1952); see also *Eastern States Lumber* case, *supra*; *Interstate Circuit* v. *U.S.*, 306 US 208, 227 (1939); *U.S.* v. *Masonite Corp.*, 316 US 265, 275 (1942); *Theatre Enterprises* v. *Paramount*, 346 US 537, 540-541 (1954)."

CONCLUSION

For the reasons stated the Supreme Court should grant your Petitioner's prayer in every respect.

Respectfully submitted,

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